SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 825

ANGHEL GOLDSTEIN, a/k/a ANDREI PIETRAHA, IULIU NASTA, a/k/a JULIUS NASTA and GEORGE FUNDI, on behalf of themselves and others similarly situated,

Petitioners,

against

JOSEPH A. COX and SAMUEL DIFALCO, Surrogates of the County of New York,

EDWARD S. SILVER, Surrogate of the County of Kings,

CHRISTOPHER C. MCGRATH, Surrogate of the County of Bronx,

JOHN T. CLANCY, Surrogate of the County of Queens,

ARTHUR LEVITT, State Comptroller,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Statement of the Case

Petitioners seek a writ of certiorari to review a judgment of the Court of Appeals for the Second Circuit entered in this case on September 27, 1967. The judgment affirmed

an order of the United States District Court of New York, dated April 4, 1967, which denied petitioners' motion to convene a three-judge court (Appendix B to Petition, pp. 9-13).

Opinions Below

The unreported memorandum opinion of the District Court is printed in petitioners' Appendix B (pp. 9-12). The Court of Appeals affirmed without opinion.

Jurisdiction

Petitioner invokes this Court's jurisdiction under 28 U.S.C., § 1254 (1).

Questions Presented

Whether the constitutional claims set forth in petitioners complaint are substantial; and whether, despite this Court's decision in *Swift & Co.* v. *Wickham*, 382 U. S. 111 (1965), the petitioners' claims require determination by a three-judge court.

Statute Involved

The statutory provisions involved are New York Surrogate's Court Act, § 269-a and 28 U.S.C., § 2281. They are printed in Appendix A to the Petition (pp. 8-9).

The Complaint

The complaint is printed in full (Appendix C, pp. 13-19). It alleges that the plaintiffs are all nationals and residents of Romania, who bring a class suit to challenge the constitutionality and enjoin the enforcement of New York Surrogate's Court Act on the ground that the statute

"violates" their federal constitutional rights and "infringes upon the exclusive power of the Federal Government over foreign affairs" (Pars. 1-3). It is further alleged that, pursuant to the statute, the New York State Comptroller is withholding certain funds, despite claims for payment and that certain Judges of the Surrogate's Court of the State of New York have ordered the withholding of distribution of other funds (Pars. 4-5).

The complaint further alleges that in 1951, the United States Treasury Department issued Treasury Circular 655, listing twelve countries, to which the forwarding of *public funds*, such as social security benefits and veteran's pensions, was prohibited (Par. 8). It also alleged that in 1969, by virtue of an agreement relating to "financial questions", Romania was removed from the proscribed list of countries to which *federal funds* might not be transferred (Par. 9). It alleges that the federal government, pursuant to *its change of official policy*, has been remitting checks and warrants representing "social security benefits, veterans' pensions and other public funds to residents in Romania (Par. 9).

The complaint also alleges: New York's "policy" as applied to Romanian residents encroaches upon and impair the federal government's power to conduct foreign relations; the *federal* conclusion that Romanian residents will receive *federal* funds constitutes official federal policy, with which New York's policy to withhold distribution of New York estates to "heirs, legatees or beneficiaries in Romania is in direct conflict"; and that, as applied to the rights of the plaintiffs and other Romanian residents, New York Surrogate's Court Act, § 269-a "deprives them arbitrarily of their distributive shares, without due process of law, in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States" (Pars. 10, 11 and 12).

New York's policy is, in addition, alleged to deprive Romanian residents of the equal protection of the laws

under the Fourteenth Amendment, solely because of their residence (Par. 13). Finally, the complaint alleges distributive shares have been withheld for more than fifteen years, in an amount exceeding one-half million dollars; and that many of the plaintiffs and others are in dire need and/or aged (Pars. 14 and 15).

The convening of a three-judge Court was requested, as well as a judgment declaring New York's policy and practice to be "violative of plaintiffs" Fifth and Fourteenth Amendment rights; declaring S.C.A., § 269-a, unconstitutional, as applied to plaintiffs; and enjoining the defendants from withholding funds from plaintiffs and others similarly situated.

ARGUMENT

The petition for certiorari should be denied. The Court of Appeals correctly sustained the holding of the District Court that a question of federal supremacy was presented by plaintiffs' allegation that there was a direct conflict between New York Surrogate's Court Act, § 269-a and the federal policy expressed in a 1960 agreement between Romania and the United States State Department. Since the complaint presented a supremacy question, it would have been incorrect to convene a three-judge court. *Swift & Co.* v. *Wickham*, 382 U. S. 111.

The only novel federal question which the plaintiffs assert by their complaint is predicated upon an alleged conflict of the provisions of the New York statute with the terms of a 1960 financial agreement made between Romania and the United States (Appendix D, *infra*), by the terms of which the Treasury removed restrictions which it had imposed in 1951 with respect to the transmission of federal funds to Romania.

Briefly, it was the petitioners' position in the Court of Appeals that, upon the execution of the 1960 agreement, a "direct conflict" arose between the terms of Surrogate's Court Act, § 269-a and the "superior federal policy based upon the Financial Agreement of March 30, 1960, between our government and that of Romania" (Court of Appeals, App. Br., p. 6). Our answer was that there is no "conflict" between the New York statute and 1960 agreement; and that the asserted supremacy of the 1960 agreement, in any event, brought the alleged constitutional question within the ambit of the decision in *Swift & Co.* v. *Wickham*, 382 U. S. 111, upon the basis of which the District Court had declined correctly to convene a three-judge court.

(1)

In *Swift & Co.* v. *Wickham, supra*, it was held to be improper for a District Court to convene a three-judge court when the basis of the attack upon the unconstitutionality of a state statute was its alleged conflict with the provisions of a federal *statute*. The reasoning of this Court, precluding the convening of a three-judge court when the Supremacy Clause of the United States Constitution is invoked, is equally applicable to a supremacy situation where the alleged conflict of the state statute is with the provisions of a federal *treaty*.

In *Swift*, the majority opinion by Mr. Justice HARLAN, stated (382 U. S., at p. 122):

> "The upshot of these decisions seems abundantly clear: Supremacy Clause cases are not within the purview of § 2281."

A footnote to this ruling, analyzing the prior cases, explained (footnote 18, pp. 122-123):

> "None of these cases can be read to suggest that the result depends on whether or not the complaint specifically invokes the Supremacy Clause, for that clause

is the inevitable underpinning for the striking down of a state enactment which is inconsistent with federal law. See the quotation from *Bransford, supra,* p. 121, a case in which the Supremacy Clause was not invoked in the complaint. See also the discussion of *Ex parte Buder, supra,* pp. 220-221. Nor do any of these cases suggest that the issue turns on the amount of statutory construction involved, whether large, small, or simply of the character that entails laying the alleged conflicting statutes side by side."*

Mr. Justice HARLAN buttressed the reasoning of the majority with "important considerations of judicial administration" which included not only the dislocation of the normal structure and functioning of the lower federal courts, but also the expansion of the Supreme Court's obligatory jurisdiction to grant direct review of District Court judgments (pp. 128-129). These considerations (previously delineated by Mr. Justice Frankfurter in *Florida Lime & Avocado Growers, Inc.* v. *Jacobsen,* 362 U. S. 73, 92-93), apply equally to situations, such as the instant one, where the basis for invoking the Supremacy Clause is an alleged conflict between a state statute and a federal "treaty". The Supremacy Clause (Article VI, cl. 2) places "Laws of the United States" and "Treaties made • • • under the Authority of the United States" in correlative positions. Each is stated to be "the Supreme Law of the Land". *Swift & Co.* v. *Wickham, supra,* p. 126, footnote 24.

U. S. v. *Georgia Pub. Serv. Com'n,* 371 U. S. 285 (1963), cited by petitioners (p. 6) does not, upon examination, aid them. In that case, the United States government had itself sued in a federal court to enjoin a state public

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* Here, the question presented is inevitably one of comparing S.C.A., § 269-a, with the terms of the 1960 agreement. The basic question is not one of "interpretation of the Federal Constitution" (382 U. S., at p. 120).

service commission from prohibiting common carriers from contracting with agencies of the federal government for the mass transportation within the State of Georgia of the household goods of civilian employees of the federal government, at rates other than those prescribed by the Georgia Commission. The case did not simply present an isolated issue of conflict between state and federal statutes; or that of a specific treaty. It presented a contention that the Georgia regulatory scheme was unconstitutional "because it burdened the exercise by the United States of its power to maintain a civilian service and to carry out other constitutional functions" (371 U. S., at p. 287). Moreover, the District Court had there convened the three-judge court; and as Mr. Justice DOUGLAS observed for the majority (371 U. S., at pp. 287-288):

> "Once convened the case can be disposed of below or here on any ground, whether or not it would have justified the calling of a three-judge court."

The *Swift* case indicates a different approach. It vacated a judgment where it deemed the convening of a three-judge court to have been improper. A similar view has also been adopted earlier this year by Mr. Justice DOUGLAS (for a unanimous Court) in *Moody* v. *Flowers*, and *Suffolk County* v. *Bianchi*, both 387 U. S. 97 (1967), cited by the petitioners in the Court of Appeals (App. Br., pp. 9-10). Judgments in both cases, predicated on "equal protection" grounds in local reapportionment cases, were vacated for failure to comply with a different requirement that exists for the convening of a three-judge court—that the statutes challenged be of "general and statewide application."

(2)

No substantial federal question is presented herein. This case concededly deals with the estates of New York decedents. State control and jurisdiction over the distribution of the estates of its decedents was recognized in *Irving*

Trust v. *Day,* 314 U. S. 556 (1942), where Mr. Justice JACKSON wrote (p. 562):

> "Nothing in the Federal Constitution forbids the legislature of a state to limit, condition, or even abolish the power of testamentary disposition over property within its jurisdiction. *Mager* v. *Grima,* 8 How. 490; *United States* v. *Fox,* 94 U. S. 315; *United States* v. *Perkins,* 163 U. S. 625; cf. *Randall* v. *Kreiger,* 23 Wall. 137, 148."

See also *Clark* v. *Allen,* 331 U. S. 503, 517 (1947).

Surrogate's Court Act, § 269-a (formerly § 269), whose application petitioners question, merely provides for the payment into court of money or property, for the benefit of a legatee, distributee or beneficiary of a trust, or such persons as may thereafter appear to be entitled thereto, of money or property due him, where "it shall appear that such legatee, distributee or beneficiary" would not have the benefit or use or control of the money or other property due him, or where other special circumstances make it desirable that such payment should be withheld (L. 1939, ch. 343).

Section 269 was enacted at the request of the Executive Committee of the New York State Surrogates' Association. Its purpose was to authorize the deposit of monies or property in the Surrogate's Court where transmission to a beneficiary, legatee, or other person resident in a foreign country might be circumvented by confiscation in whole or in part. The section was designed to authorize the impounding of the fund by the Surrogate to await the time when payment could be made "to the beneficiary for his own benefit, use and control" (Gilbert-Bliss, Civil Practice Act of New York, Vol. 13 B, p. 155, recompiled 1952).

In 1960, the section was amended by adding to it a second subdivision, placing upon any non-resident "alien legatee, distributee or beneficiary of a trust", the burden

of proving, in any proceeding to obtain the money, that he would have the benefit or use or control of the money or other property due him. The provisions of the subdivision relating to such burden of proof were expressly made applicable to any person "claiming from, through or under" such non-resident alien (L. 1960, ch. 975).

Section 269 is not an escheat statute. Accordingly, *Kolovrot* v. *Oregon*, 366 U. S. 187 (1960), which the petitioners cite (p. 7) has no bearing. In *Kolovrot*, the Court merely held that Oregon could not, in the face of a United States treaty with Yugoslavia, entitling citizens and residents of Yugoslavia to inherit personal property from their American relatives, under an Oregon statute, declare an escheat and *prevent residents and citizens of Yugoslavia from inheriting the property of two Oregon residents.*

Section 269 is not alleged to be in conflict with any *treaty* made by the United States. It is merely alleged to be in conflict with the "overriding federal policy" set forth in the 1960 agreement concerning "financial questions" (A-17).

The alleged agreement, dated March 30, 1960, referred to in the complaint (Par. 9), merely (a) removed federal regulations of a *blocking* nature which *prohibited* the transmission of funds to Romania and (b) agreed to revise a Treasury regulation in order to permit the transmission of *federal* funds to Romania nationals. It did not purport to remove from any of the States their power or jurisdiction over the devolution of decedent's estates.

In *Matter of Braier*, 305 N. Y. 148 (1953), app. dism. *sub nom. Kalmane* v. *Green*, 346 U. S. 802 (1953), the constitutionality of Surr. Ct. Act § 269-a (formerly § 269) was sustained. The section has been construed to *protect*, not to impair, the rights of non-resident alien legatees or distributees.

In *Matter of Marek*, 11 N. Y. 2d 740 (1962), app. dism. 371 U. S. 30 (1962), a further effort to have Surr. Ct. Act § 269-a, declared unconstitutional met with failure. Mr. Justice Douglas, in a formal opinion (371 U. S. 30-34) dissented and indicated that he would have noted jurisdiction in order to have the Supreme Court pass upon the question of whether the New York statute constituted an impairment of the "effective exercise of the Nation's foreign policy" (p. 32). The majority of the Court, in the usual form of *per curiam* opinion, voted (*after the* 1960 agreement) to dismiss the appeal (p. 30):

"for want of a substantial federal question."

(3)

The utter lack of merit of the petitioners' application is further demonstrated by the fact that, in appropriate cases, where the New York courts have found that alien beneficiaries or distributees might be able to enjoy the beneficial use of their legacies or distributive shares, the New York Surrogates have permitted transmission of such legacies or shares. See *Matter of Saniuk*, 21 A. D. 2d 922 (3rd Dept., 1964), leave den. 15 N. Y. 2d 482 (1964); *Matter of Siegler*, 25 A. D. 2d 805 (3rd Dept., 1966); and *Matter of Krasowski* (3rd Dept., Oct. 27, 1967), reported unofficially 158 N.Y.L.J., No. 90, Nov. 9, 1967, front page; where New York Surrogate's Courts directed payments to be made to Soviet distributees and Hungarian and Polish beneficiaries, respectively. Compare *Matter of Droganoff*, 43 Misc. 2d 233 (Surr. Ct., Westchester Co., 1964), where it was held that, even after an "Iron Curtain" country had been removed from listing under Treasury Department Circular No. 655, it was still the duty of a New York Surrogate to make his own independent determination, based upon a compliance with the statutory requirement that a petitioner meet his burden of proof, that Bulgarian legatees or distributees would receive the benefit, use or control of funds from a New York decedent's

estate. The evidence in the *Droganoff* case, consisting of news releases, a New York State Insurance Department letter and two purported judicial determinations, was held to be insufficient. See also *Matter of Polubatko*, 21 A. D. 2d 735 (4th Dept., 1964), where the evidence was held to be insufficient to warrant the transfer of funds to Latvian distributees.

The 1963 article by Prof. William L. Boyd, cited by petitioners (p. 7) recognizes that statutes like Surrogate's Court Act, § 269-a (the category he describes as "eastern statutes") are designed "to preserve rather than confiscate the distributees' shares" (51 Georgetown Law Journal 470, at p. 487). Professor Boyd goes further and states (p. 487):

> "The classification set forth in this statute is reasonable and does not constitute a violation of the equal protection clause to the extent that the statute seeks to effectuate the decedent's intent that his beneficiaries should have the benefit of their estate shares."

Further, Professor Boyd concludes (op. cit., p. 513):

> "The Treasury regulation should not be relied on as a statement of federal policy with respect to the distribution of shares in decedent's estates. The standard State Department response is so ambiguous that it does not reveal a federal policy."

To date, the federal government has not seen fit to promulgate any regulation or to announce any policy dealing with the distribution of estate shares. Absent such an announcement, the federal courts need not now confront the problem of determining what significance such an announcement would have. Nor need this Court or a three-judge court undertake the review of the decision in *Clark* v. *Allen*, 331 U. S. 503 (1947), which Professor Boyd has suggested (op. cit., p. 515).

(4)

Since the New York cases (cited by us in subdivision 3, *supra*) indicate that in each case a separate exercise of discretion by the Surrogate is warranted in the application of Surr. Ct. Act, § 269-a, the petitioners have no standing to petition in this Court on behalf of persons "similarly situated" (Complaint, A-14, 19).

Conclusion

(1)

As noted by the District Court (A-10), the constitutionality of Surrogate's Court Act, § 269-a has twice been upheld by the New York courts and this Court has in each case dismissed "for want of a substantial federal question." *Matter of Braier*, 305 N. Y. 148, 691 (1953), appeal dismissed *sub nom. Kalmane* v. *Green*, 346 U. S. 802 (1953); *Matter of Marek*, 11 N. Y. 2d 740 (1962), appeal dismissed *sub nom. Ioannou* v. *New York*, 371 U. S. 30 (1962). These cases appear to have disposed of any due process question.

Moreover, as the District Court noted (A-10), the petitioners' deprivation of "equal protection" claim and the contention that the statute "impairs the effective exercise of the power to conduct foreign relations which is constitutionally vested in the Federal Government to the exclusion of the State of New York" are *frivolous*. *Clark* v. *Allen*, 331 U. S. 503, 516 (1947).

(2)

Only the "possible conflict" between the New York statute and the federal policy vis-a-vis Romania, as expressed in the 1960 agreement and subsequent federal regulations, had not specifically been set at rest by the decisions cited in the two preceding paragraphs.

But that question, as the District Court noted (A-12), is one of federal "supremacy". By reason of the nature of the question, whether it be regarded as "substantial", as it was by the District Court, or insubstantial, as we contend, the Courts below have properly held that it should be decided by one District Court judge, rather than by a three-judge court. *Swift & Co.*, 382 U. S. 111 (1965).

The petition for a Writ of Certiorari should be denied.

Dated: New York, New York, December 1st, 1967.

Respectfully submitted,

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APPENDIX D

Excerpt From March 30, 1960 Agreement Dealing With Treasury Department Circular 655 (Italics supplied)

"I have the honor to refer to the recent discussions between representatives of the Government of the Rumanian People's Republic and the Government of the United States of America regarding the restriction contained in the regulation of the Government of the United States of America known as Treasury Department Circular 655 concerning the transfer of money from *United States public funds* to payees in Rumania.

"In this connection I wish to inform you that:

(a) The Government of the Rumanian People's Republic places no obstacles or limitations preventing recipients of allowances, social security payments, military pension and other payments by the United States authorities, from holding checks for such payments in accordance with existing regulations of the Rumanian People's Republic and from converting them at the most favorable prevailing rate for remittances to private persons, at present 6 lei to the dollar plus 6 lei representing an exchange premium of 100%.

(b) The Government of the Rumanian People's Republic places no obstacles in the way of beneficiaries in Rumania who may have various claims against United States remitting agencies (such as the Social Security Administration, the Veterans Administration, and any other agencies concerned) furnishing such agencies such information and documentation as may be required by United States law in

connection with these claims and communicating directly or indirectly with respect to these matters with the American authorities concerned.

"In accordance with the understanding we have reached, I will appreciate receiving your confirmation that the Government of the United States of America, taking into account the above assurances, agrees to remove the restrictions contained in Treasury Department Circular 655.

"Accept, Excellency, the assurances of my highest consideration."

I hereby confirm that, in view of the assurances contained in your letter, the Government of the United States of America will amend Circular No. 655 issued by the Secretary of the Treasury of the United States of America, so as to remove the restriction on the transfer of money from *United States public funds* to payees in Rumania.